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## Comments

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## COMMENTS

### POLICE—PHILADELPHIA'S POLICE ADVISORY BOARD—A NEW CONCEPT IN COMMUNITY RELATIONS

#### I.

##### AUTHORITY AND RESPONSIBILITY OF THE BOARD.

The Board shall investigate, hear and determine complaints by citizens, civic groups or public officials or employees of alleged misconduct to private civilians by the personnel of the Police Department. the term "misconduct" shall include, but not be limited to, mistreatment, abusive language, false arrest, unreasonable or unwarranted use of force, unreasonable searches and seizures or discrimination because of race or religion or national origin.<sup>1</sup>

#### A.

##### Background of the Board.<sup>2</sup>

During the early and middle fifties, considerable hue and cry was raised by certain individuals and groups, concerning the "brutality" of the Philadelphia Police Force. Among the loudest and most persistent of these groups were the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP). This campaign against alleged abuses of police power and discrimination by the police against the Negro community continued in full force until 1957. At this time the general attack narrowed and focused specifically on the only extra-judicial procedure then available for the airing of grievances against an individual policeman or a particular departmental policy.

At this time, when a citizen felt himself sufficiently aggrieved by police action, but did not wish to bring his cause before a court of law, he could make a direct complaint to the Police Commissioner. The Commissioner, in turn, would order a special investigation into the matter, or would forward the complaint to the Police Board of Inquiry. This Board was made up entirely of members of the Police Department, and was charged with hearing all complaints against officers. Much of the criticism

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1. Rules and Procedures: The Police Review Board of the City of Philadelphia, September 15, 1959.

2. Much of the information contained in this section was obtained from an article of the Police Advisory Board by Spencer Coxe, Executive Director of the Greater Philadelphia Branch of the American Civil Liberties Union, Coxe, *Police Advisory Board: The Philadelphia Story*, 35 CONN. BAR. JOUR. 138 (1961).

from the ACLU and the NAACP was directed at this Board, and charges of "whitewash" were hurled whenever a complaint was dismissed as unfounded.

No one can say for certain whether, or to what degree, these protests were based on the facts of an individual case, or whether they were motivated entirely by a visceral reaction. It may be helpful, however, to present at this point a brief statistical analysis of the decisions of the Board of Inquiry, based on a five-year average from 1955 to 1959. Of a total of approximately 200 cases heard yearly by the Board, there were, on the average, only 30 findings of "not guilty," and 8 cases in which the charges were dropped before final disposition. In the remaining cases, where the officer was found "guilty," there were 15 dismissals, 30 departmental reprimands, and 107 suspensions. Of the latter, the average period of suspension was 7.1 days. It is also important to note that these figures do not include the cases where the officer accused had resigned under fire. Although such statistics are by no means conclusive, especially with respect to individual cases, it would appear that any general charge of leniency or attempted "whitewash" on the part of the Board, had little basis in fact.

During the course of the campaign against the Police Board of Inquiry, the ACLU proposed the creation of a separate and independent tribunal to hear citizens' complaints. A similar proposal was suggested by the Philadelphia Fellowship Commission and support was elicited from other civic groups. Mr. Henry W. Sawyer III, president of the Philadelphia branch of the ACLU, and a member of the City Council, introduced into the Council a bill which would create a Police Review Board. A public hearing was held and considerable publicity was given to the proposal,<sup>3</sup> but it was rejected by the Council. Mr. Sawyer immediately requested Philadelphia's Mayor Richardson Dilworth to act, and received assurances from the Mayor that such a board would be created.

## B.

### Creation and Evolution of the Board.

On October 1, 1958, pursuant to the authority conferred upon him by the Philadelphia Home Rule Charter,<sup>4</sup> Mayor Dilworth created the Police Advisory Board<sup>5</sup> by dispatching letters of appointment to the five persons whom he chose to be members of the Board. These included: A sociologist,

3. This publicity, in Mr. Coxe's own words, "helped to increase public awareness of the problem of police practices, and more important, to bring home to the city administration the need for some action, if only to placate councilmen whose constituents were complaining, and the Negro segment of the population which saw itself as the principle butt of illegal police action." Coxe, *supra* note 2 at 142.

4. Philadelphia Home Rule Charter, § 3-100(h) (1951).

5. The Board, as originally created, was called the Police Review Board. This name was changed by a compromise agreement with the representatives of the Fraternal Order of Police in December of 1959, following an attempt by the FOP to enjoin the operation of the Board.

a widely renowned Quaker leader, an attorney, a clergyman and a labor leader.<sup>6</sup> The Board, as created, was almost identical to that proposed by the ACLU and by the Sawyer ordinance. The only discernable difference was that the members of the present Board were chosen by the Mayor personally, whereas the ACLU had proposed that one member be chosen by the City Managing Director, two by the Police Commissioner, and two by the Chancellor of the Philadelphia Bar Association.<sup>7</sup>

The Board was "charged with hearing grievances of any citizen who has a complaint against any member of the Philadelphia Police Department, based upon a charge of brutality, racial or religious discrimination, or violation of state or federal constitutional rights."<sup>8</sup> The Board, however, was denied the power to punish, and was given authority only to make recommendations to the Commissioner on the disposition of the case.

The letters of appointment from the Mayor laid down only the basic purpose of the Board, and in its First Annual Report, the Board itself set forth its own rules and procedures. Basically, the rules at present are the same as originally set forth, and are, in essence, that:

1. The complaint, from any person or organization (not necessarily from the one aggrieved), must, under normal circumstances, be filed with the Board or some other city authority within ninety days after the incident.

2. The Board, if any member shall feel that action is warranted, may either order an investigation by the police, or else conduct its own investigation.

3. The Board will not refuse to consider the merits of a complaint even though civil or criminal proceedings, arising from the same incident, are being adjudicated simultaneously.<sup>9</sup>

4. Before any punitive action can be recommended by the Board, the police officer must be given a public hearing, if he requests it.

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6. The original members of the Board were: Dr. Thorsten Sellin, who is chairman of the Board of Trustees, Philadelphia Prisons, and former head of the Department of Sociology, University of Pennsylvania; Clarence Pickett, Executive Director Emeritus, American Friends Service Committee and holder of the Nobel Peace Prize; William T. Coleman, Jr., Esq., a prominent Negro attorney; the Rt. Rev. Msgr. Edward M. Reilly, formerly Superintendent of Schools of the Archdiocese of Philadelphia (who has since resigned from the Board); and William Ross, a member of the Philadelphia Joint Board of the International Ladies Garment Workers' Union. The Board has recently been increased by the addition of four new members, raising the total membership to eight. It is planned that they will be broken up into two panels, of four each, to hear separate complaints. These new members include: The Rev. W. Carter Merbrier, a Lutheran Minister; Mrs. Maurice Clifford, a Negro civic leader; and two attorneys; Charles W. Bowser, Esq. and Mercer D. Tate, Esq.

7. Coxe, *supra* note 2 at 140.

8. Third Annual Report of the Police Advisory Board of the City of Philadelphia, September 30, 1961.

9. This rule was later modified by the agreement with the FOP, *supra* note 5. At present no action will be taken by the Board if there is an independent action, arising out of the same incident, pending against the police officer.

5. Both sides (or their counsel) have the right to offer testimony themselves, and by witnesses, and to cross examine. Strict rules of evidence are not followed at these hearings.

Although the letters of appointment from the Mayor gave legal existence to the Board, it was severely hampered by a total lack of monetary support. Since its creation had been by executive order, there was no appropriation from Council to lend fiscal stability. This greatly hampered the initial efficiency of the Board. At the outset, one of the members of the Board, an attorney, voluntarily took charge of the administrative duties, but due to the pressures of his private practice, his assistance was necessarily on a spare time basis. During the summer of 1959, a law student, referred to the Board by the ACLU, took over these administrative duties.

During the first eleven months of operation, only thirty-two complaints were received. Even so, it was seen that the Board could not effectively continue without financial support. Therefore, the Board in its First Annual Report requested funds for the appointment of an administrative assistant; whereupon \$4,000.00 was appropriated by the City Council from its General Fund and allocated to the Board for 1960. In April of 1960, Martin S. Barol, Esquire was appointed as Executive Director.<sup>10</sup> Mr. Barol received a salary of \$3,600.00 a year, with the remaining \$400.00 being set aside for Board expenses. In its Second and Third Annual Reports, the Board requested an increase in its allocation to \$5,500.00 a year, but this increase was denied by the City Council in 1961. However, in 1962 the Council appropriated \$5,000.00 for the use of the Board. The entire amount goes to Mr. Barol as salary.

## II.

### OPERATION OF THE BOARD.

#### A.

#### Filing of the Complaint.

Complaints are filed with the Board directly by the individuals involved — by letter or personally at the office of the Executive Director, through governmental agencies including the Mayor's office, City Council, and the Commission on Human Relations, and through various civic organizations, such as the National Association for the

10. "The Executive Director receives all the complaints made to the Board, either through the mail or by personal interview in his office; he maintains liaison with the Police Commissioner in the investigation of the complaints; and in the final disposition thereof; he puts in writing the Board's decisions, sending the original decision to the Mayor with copies to Managing Director, Police Commissioner and all parties involved; he submits a monthly report to City Council; he represents the Board on various civic committees such as the Committee on Community Tensions of the Fellowship Commission; and finally he carries on correspondence for the Board both with the City and with other cities that have shown an interest in the Board's activities." Third Annual Report of the Police Advisory Board, page 6, September 30, 1961.

Advancement of Colored People, the Philadelphia Fellowship Commission, and the Philadelphia Branch of the American Civil Liberties Union.<sup>11</sup>

At this initial stage, all contact between the complainant and the Board is through its Executive Director. It is the latter's duty to determine whether the complaint comes within the jurisdiction of the Board. Since this jurisdiction covers practically the entire scope of police-community relations, jurisdiction is almost a foregone conclusion — the only exception being where there is a judicial proceeding, stemming from the same incident, already in progress against the officer.

In some cases this initial contact may culminate in the final resolution of the complaint. The Board Report states that:

Often the Executive Director, in an interview in his office, has been able to placate an irate citizen by explaining the legality of the officer's act. This is especially true in motor vehicle cases where the citizen, unaware of the provision of the Pennsylvania Motor Vehicle Code which gives the officer the right to stop vehicles and examine the operator's registration card and license and to check equipment, is resentful of what he considers an "invasion" of his rights.<sup>12</sup>

Although the Report used the term, "often," it would appear that the incidence of such simple and unfettered complaints is relatively infrequent. The vast majority of all complaints demand further investigation.

#### B.

##### Investigation of the Complaint.

When a complaint is received that comes within the jurisdiction of the Board, the Board sends a copy of the complaint with a request to the Police Commissioner that the matter be investigated. The investigation report, which consists of interviews with the complainant, witnesses and the policeman involved, is forwarded to the Board.<sup>13</sup>

During the tenure of the former Police Commissioner, Thomas J. Gibbons, these investigations were carried on by one inspector, whose investigation reports were clear, succinct and objective. However, with the appointment of a new Commissioner, this system was modified, and the investigations were carried out by the inspectors and captains of the specific district in which the incident occurred. The procedure has again been changed and all investigations are currently under the supervision of Allen Ballard, the man who handled the job for Commissioner Gibbons. Mr. Ballard's title is Chief Inspector in charge of Police-Community Relations.

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11. *Id.* at 2.

12. *Id.* at 4.

13. *Id.* at 3.

## C.

## Informal Settlement.

This is probably the area in which the Board performs its most useful service. There are many instances in which the investigation shows some justification for the citizen's complaint. This is especially true in complaints of illegal arrest, illegal search and seizure, and police harassment. It is also often true that while the officer may have been technically correct in his action, the complainant has, nonetheless, been left with a feeling of animosity toward the police. The Executive Director will in those cases attempt to bring the two sides together for a discussion of the incident. The Police Department is usually represented by the officer in direct command over the man involved or sometimes by the district inspector. Each side listens to the views of the other. This discussion often brings both to the realization that there are two reasonable sides to the question. Many times the discussion ends with withdrawal of the complaint, and restoration of the citizen-police relationship to a level of mutual respect.

Even in those cases where the officer is definitely in the wrong, many citizens are not really interested in having disciplinary action taken against him. In such cases, an apology, either by letter or in person, and an assurance that his rights will be respected in the future, will suffice to placate the complainant.

The Board in these instances has acted as a safety valve in the community. No longer is it necessary for a citizen who has felt himself wronged by police actions to harbor resentment within himself, or to spread his hostile feelings throughout the community. The Board is at their [sic] disposal, ready to resolve [sic] their problems in a mature and constructive manner.<sup>14</sup>

## 1.

## Expunging of the Record.

One aspect of the informal procedure which would seem to demand a closer analysis concerns the arrest record, which is the focal point in many of these controversies. There is no doubt that an arrest can be a very serious blotch on any person's record. This is especially true with regard to jobs in civil service or in strategic industries. The Board has recognized this fact and has instituted a formal procedure to deal with illegal arrests. It will, after a thorough investigation of a request to have an arrest record removed from police files, and if it concurs with the request, recommend to the Police Commissioner that steps be taken to expunge the record. The record of the illegal arrest will usually then be expunged from the police file regardless of whether it is the man's

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14. *Id.* at 4.

first or tenth arrest. This procedure is not only logical, but necessary to the fair administration of justice.

It can be challenged, however, when it becomes an all too easily available result of the informal settlement. In some cases, it would appear that a charge of brutality or other serious offense may have been brought against the officer, with just this end in view. A compromise is proposed, and the Police Department, rather than subject one of its officers to a drawn out hearing on the question, will accede to the proposal that if the record is expunged, the complaint will be dropped. The Board has not objected to any such plan and in fact has condoned such practice. Approximately twenty complaints have been withdrawn after an agreement was obtained from the police to remove the records. Such conduct, though admittedly an easy way out for all parties involved, would seem repugnant to the proper administration of justice.

## 2.

### Complaints without Justification.

In many cases, the Executive Director, in reviewing the investigation report, makes a determination that there is not sufficient justification for the complaint. This is usually done where there are impartial witnesses who substantiate the officer's version of the incident, or where the evidence is otherwise contrary to the complainant's story. In such a case, the complainant is notified of this determination, but is given a further opportunity to pursue the inquiry. He is given ten days to file a request for a public hearing, and if this request is not forthcoming, the case is considered closed. The great majority of the complaints are withdrawn after such notification.

## D.

### The Hearing.

Where the Board feels that a public hearing is justified or where a hearing is specially requested by a complainant, a date is set for the hearing and notice is sent to all parties concerned.

During the three years of the Board's existence, it has received a total of 214 complaints. Thirty-two of these were received during the first year, seventy-five during the second year, and one hundred and seven of these were received during the past year.

Of this total, only thirty-five were the subject of a hearing before the Board. Three other complaints were slated for hearing, but the complainant failed to appear. Of the thirty-five complaints on which a decision was rendered, the complainant was sustained on twenty-one, the police officers on twelve. In two cases, it was decided that no disciplinary action



should be taken against the officers, but the Board took the opportunity to criticize Police Department policy.<sup>15</sup>

Twenty-seven decisions were actually put down in writing, some in the form of letters but most in the form of official decisions. It is in this area, therefore, that we must confine ourselves in any real analysis of Board decisions. Of these twenty-seven complaints, twenty-one concerned brutality or undue force (three of these also involved illegal arrest and one also involved illegal search and seizure), two concerned illegal arrest, three concerned harassment, and one dealt with illegal search and seizure. Eleven of the decisions upheld the police officer. Sixteen upheld the complainant. To draw a pattern from such a small number of decisions may be an impossible task. However, perhaps there may be some significance in the facts that:

1. Of the first eleven decisions, only two were in favor of the police officer. In one of these, it was found that a charge of illegal search and seizure was unjustified because the officer presented the search warrant at the hearing. In the other, although it was found that a charge of undue force was not substantiated, the Board did berate the officer for being over-zealous in carrying out his duty.

2. Of the last nine decisions, only three were in favor of the police officer.

3. It is only in the interim period following the controversial *Conway* case, that the results were heavily in favor of the police officer (six to one).

In the *Conway* case, the officer was subjected to Board action even though he had been acquitted of any wrongdoing by a court of law and by the Police Board of Inquiry. Following the institution of this case, and to a great degree prompted by it, the Fraternal Order of Police sought to enjoin the operation of the Board. After a drawn-out court fight, the FOP and the Board reached a compromise and the request for the injunction was withdrawn. It would seem, however, that this case was a pivotal point in the history of the Board, and may have influenced the Board in the decisions immediately following it.

#### E.

#### Actual Cases.

Although it is neither possible nor feasible to include every reported decision in a study of this kind, a selective sampling of them can be considered.

One decision concerned a complaint received during the early days of the Board. The incident complained of took place aboard a train that had just pulled into a Philadelphia station with a group returning from

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15. Second Annual Report of the Police Advisory Board, page 7, September 30, 1960.

an all day outing. This outing, sponsored by a Negro sorority, had been held at a nearby amusement park where many people had been injured earlier when fights broke out between guests at the outing and white visitors to the park. The police had received a report that the rioting had continued on the train and several patrol cars proceeded to the station. Upon entering the particular train car involved, the police found a general state of confusion, and some injured persons. In the confusion, an altercation ensued between the complainant and the officer charged with brutality. It appears from the testimony that the officer struck the complainant and both men became entangled and fell from the train onto the platform. The complainant received a cut on the lip requiring several stitches. The Board subsequently found that although there was no actual riot on the train, the police had good reason to believe that a riot was in progress. They also found that there was no justification or extenuating circumstances which would justify the striking. But it was found that the policeman bore no malice toward the complainant, and was very apprehensive because he thought that a riot was in progress on the train. An added factor in the case was that the complainant was a slight man of 165 pounds, who seemed to the Board to be a quiet, retiring person who, on a volunteer basis, had worked with a youth group, while the policeman was tall and stocky and weighed 195 pounds. Considering all these factors, the police officer was given a five-day suspension and a departmental reprimand.

Another case revolved around an interracial party in the complainant's apartment. The police had received an earlier complaint from a neighbor concerning the gatherings in this apartment. The officers testified that they had been keeping the location under surveillance and that on the night in question they heard loud noises emanating from the apartment. They also testified that when they went to investigate and attempt to quiet the party, they were greeted with cries of "Gestapo tactics!" from the assembled guests. The officers also testified that they found a Negro man in bed with a white girl and a bottle of whiskey beside the bed. All persons present were arrested for disorderly conduct. The complainant and other persons present at the party testified that the party was a quiet one, with everyone simply sitting around listening to a tape recorder, and that at all times they were cooperative with the police. The Board found that there were no loud noises coming from the apartment and that even if there were, the police did not request that the noises should cease. Therefore, the raid and arrests were found to be unjustified and based purely on the interracial nature of the group. Based on the these findings, the Board recommended that the five officers involved in the arrests should be suspended for one day and receive departmental reprimands.<sup>16</sup>

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16. In this case the Police Commissioner refused to follow the Board's recommendation that the officers be suspended.

In a third case, the police, investigating a loud disturbance, came upon the complainant sitting in his car. The officers questioned him and asked for identification. When they found a longshoreman's hook on the back floor, they asked the complainant to get out of the car. At this point, the two stories became almost completely contradictory. The complainant stated that when he got out of his car, one of the officers immediately hit him in the stomach, and then kicked him in the ribs when he fell to the ground. He also stated that he was a diabetic and could not fight back, and that the police officer called him a "Black Nigger." The officers testified that when they attempted to search the complainant, he started swinging his arms and refused to allow the search. One officer testified that when the complainant resisted their efforts to search the car, he hit him with his fist and knocked him down, but denied kicking him or using abusive language toward him. The Board found that the officer did hit and kick the complainant when he was down, and that he did use foul and abusive language toward him. They found that this was far more force than was necessary and recommended that the officer be suspended for seven days and that a departmental reprimand be placed in his record.

In two other cases, one involving an interracial couple involved in a routine car stop, and the other involving another interracial party, the Board found that the police interference was prompted solely by the interracial nature of the situation and hence unjustified.<sup>17</sup>

It is clear that the above sampling involves only cases where the decision was against the police officer. It should also be made clear that the decisions selected are neither representative of all Board decisions, nor were they selected because the author *necessarily* agrees or disagrees with their findings and conclusions. They were included because they were inexorably bound up with the problem of race relations. And it is submitted that this is the problem which is present, to a greater or lesser degree, in a majority of cases heard by the Board.

It is clear that such a conclusion treads on very sensitive ground. It is equally clear that such a proposition cannot be completely backed up by statistical proof, for neither the records nor the decisions of the Board disclose the race of complainant or officer.

The conclusion was reached, however, after the careful reading of countless complaints with due regard to the sections of the city where the complainants lived. It was also supported by the statements of the Executive Director, in which he admitted that approximately 85% of the complaints to the Board are received from Negro citizens.<sup>18</sup>

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17. In the case involving the interracial couple who were stopped while in their car, the Commissioner again refused to follow the recommendation of the Board that the officers be suspended.

18. Mr. Barol has denied to the editor-in-chief that he ever made such a statement. He insists that the percentage is no more than sixty per cent. However, in an article on p. 13 of *The Philadelphia Independent*, Nov. 5, 1960, such a state-

## III.

## THE BOARD AND THE NEGRO COMMUNITY.

There can be no real doubt but that in Philadelphia, like in many other large metropolitan cities, the Negro population has increased sharply during the last few decades. Also, due to many factors, the Negro has found himself confined to certain sections of the city, which by and large, are located in the older and more run-down portions of the community. It is no real secret, that these sections are also the "high crime rate" areas. For the purposes of this article, the cause of this condition is immaterial, and only the fact of its existence is important. Due to this high crime rate, the police activity in these areas is naturally far greater than in other areas of the city. Because of these factors, it is undoubtedly true that contacts between the individual members of the Negro community and the police should be, and in fact are, much more frequent than the contacts in other sections of the city.

Following through in strict syllogistic fashion, the conclusion would seem clear that here lies the reason for the great number of complaints against the police, coming before the Board from this community. There is certainly much merit to this conclusion. But there are other factors involved and, although not clearly apparent in a statistical analysis of the Board's accomplishments, they should, nevertheless, be included in any comprehensive study of the Board.

## A.

## The Negro Press.

It is extremely difficult to describe the workings of the Negro press in Philadelphia, or to analyze its effect upon the Negro community. Who can really weigh the harvest reaped by one inflammatory headline after another, decrying the inhuman brutality of police toward the Negro. Pictures, captions, editorials, day after day, "proving" how a Negro isn't free to walk the streets of the city without being subject to a vicious attack by club wielding, quick-on-the-trigger cops. Although most of the Negro newspapers are behind the Board as the protector of the Negro community, at least one is apparently its staunch enemy.

This paper, bearing the slogan "The People's Paper for all the Family," in 1960 carried on its front page an editorial concerning the Board.<sup>19</sup> The editorial reiterated its position that the Negro should bypass the Board and seek redress in the courts, where they would not be receiving any special favors. The writer stated that "I never thought

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ment is attributed to Mr. Barol. Also, when the author questioned Mr. Barol about this figure, at an earlier meeting, he admitted that this was the approximate percentage of the complaints which were received from Negroes.

19. *The Philadelphia Independent*, September 3, 1960.

the Board could do an effective job if only because of the fact that its lone Negro member, William T. Coleman, Jr., is a law partner in the firm Mayor Dilworth heads, and nobody would expect him to do anything that would embarrass the Mayor, particularly when the Mayor speaks of his police force as the 'world's finest.' Next to this editorial and covering half the front page appeared a cartoon, captioned "Philadelphia's Finest." In the cartoon there is a particularly brutal caricature of a white policeman, who stands with a smoking revolver in one hand and a night-stick dripping blood in the other. On the ground around him are the bodies of young Negroes lying in pools of blood, and his foot is raised as if to trample a young colored girl beneath him. At the bottom of the cartoon lies a prostrate young man, blood gushing from his head, holding a sign stating, "This could happen to YOU."

If this is the type of material that is daily thrust before the Negroes' eyes, is it any wonder that any Negro, involved in an incident with the police, will be very likely to cry "brutality" and "discrimination"?

B.

The NAACP.

Although there certainly can be no comparison between the NAACP and the sensational Negro newspapers in methods, it may be found that they have a slight similarity in basic attitude. The adjective "slight" is used for the reason that any similarity between the two approaches is truly that. The NAACP does not stand for the proposition that the entire police force is out to "get" the Negro. It is, however, especially sensitive to any charge of "discrimination," and understandably so. It has championed the cause of racial equality through a long hard fight. It cannot become truly objective or compromising when it is faced with figures showing the high arrest rate among Negroes, on the one hand, and the cries of discrimination and brutality by the police against Negroes on the other. The NAACP has no real choice; either it must carry the banner of "police brutality" or lose its place of leadership in the Negro community.

This is of course not to say that cases of "brutality" and "discrimination" do not exist. But it is submitted that it is equally wrong to search for the seeds of racial discrimination in numerous arrests, or raise the cry of "inequality before the law", simply because the rate of arrests of Negroes by white officers is extremely high in a high-crime rate area of the city. It seems equally incongruous to take the position that the Police Advisory Board is the only haven for the beleaguered Negro citizen:

Why is the NAACP so concerned about the Police Advisory Board? For over ten years I, as a member or as chairman of the Philadelphia Branch NAACP Legal Redress Committee, represented a number of Negroes on behalf of the Branch in police cases.

Before the creation of the Police Advisory Board on October 1, 1958, (which, by the way, was the result of the effort of a number of agencies including the NAACP and the Fellowship Commission), the only recourse against an offending officer was to have a warrant taken out for him before a Magistrate. Many times, unless there was a Negro Magistrate, you just couldn't get the warrant issued. And after the warrant was issued, in not a single case that I know of did a court find the police officer guilty of the misconduct charged. The only other possible relief was little short of laughable and that was the old Police Trial Board, for there it was certain that the police officer, tried by police officers, would not be found guilty no matter how strong the evidence. . . .

*Signed* /James K. Baker, Esquire  
Executive Secretary  
Philadelphia Branch NAACP<sup>20</sup>

A similar theory was put forth in a letter to the Editor of the Philadelphia Evening Bulletin, where the reader asked the Police Commissioner whether any policemen were ever arrested for their misconduct. The following reply was printed along with the question:

Police Commissioner, Albert N. Brown says that thirty policemen were arrested in 1960 for various criminal charges. Of these, he said, nine were found guilty, nine were adjudged not guilty, and twelve are pending. There were nine cases of assault, four cases of attempted bribery and one of false arrest. The others include morals charges, drunken driving, and miscellaneous charges. During the year, forty-nine were fired for violation of police regulations and twenty-one quit under fire.<sup>21</sup>

If Mr. Baker's charges referred to the general fact that police officers are never arrested or convicted, then the above facts would appear to refute this claim. If, however, his charge is that police officers are never arrested or convicted when the complaint has been brought by a Negro, then Mr. Baker's contempt for the justice obtainable in the courts of Philadelphia is certainly very great.

#### IV.

##### THE AMERICAN CIVIL LIBERTIES UNION.

The attitude of the ACLU is neither that of the Negro Press nor that of the NAACP. Its complaint against the police is more general and devoid of racial overtones. As Coxe states in his article, ". . . [A]s many white persons suffer at the hands of the police as Negroes. Therefore, the problem of police practices is not merely a facet of the race problem; unfortunately, the police tend to infringe upon constitutional rights with-

20. *The Pittsburgh Courier*, Letters to the Editor, October 13, 1960.

21. *The [Philadelphia] Evening Bulletin*, September 23, 1961.

out regard to race, religion, or national origin.”<sup>22</sup> In the literary organ of the Philadelphia ACLU, the *Civil Liberties Record*, Mr. Coxe again stated the position of the ACLU. In answering a letter to the *Record* by a Negro newspaperwoman, who had made the complaint, among other things, that “her people were being used to bring up an officer’s arrest quota,” Mr. Coxe said:

The ACLU shares your concern with illegal police practices. In fact, in the aggregate we spend more time on this problem than on any other. What you say is indeed true — illegal entries, searches, and arrests, take place on a massive scale, and many victims are afraid to complain.<sup>23</sup>

Nor is the ACLU lacking in clever cartoonists. In the same edition of the *Record*, along side of an article discussing the Board, the following cartoon appeared. Three men were peering into a darkened room. The name, “Police Advisory Board,” written below them, clearly showed whom they portrayed. In the darkened room, a policeman, one hand grasping a cowering man, was preparing to wield a blackjack with the other hand. The officer’s words were, “How do you expect a guy to do his job when you’re looking over his shoulder?”

These examples prove nothing really extraordinary except possibly that the ACLU believes that the incidence of police brutality and illegality in Philadelphia and elsewhere is extremely high. However, taken in conjunction with its many other stated objectives, such as: “making illegally obtained evidence inadmissible in criminal trials, substituting summonses for arrests for most offenses, restricting the authority of police to make fingerprint and photographic records of arrested persons, and making the city liable for damages resulting from illegal acts of policemen,”<sup>24</sup> a basic philosophy of the ACLU can readily be seen. Reduced to its simplest terms, this philosophy would appear to be that an effective police force is the greatest single barrier to the attainment of the ultimate freedom of the individual. The scope of this comment does not permit a discussion on the merits of this proposition. However, such a discussion, or even an extensive analysis of the workings of ACLU, is unnecessary to prove that such a philosophy does in fact exist.

Basic philosophies aside, it would seem to be a reasonable conclusion that the theories of the ACLU are not those of the great majority of our citizens. Irrespective of this fact, it would appear clear that the ACLU has assumed the role of prime mover in the establishment of police review boards. There can be no question that the ACLU was a militant advocate of the Philadelphia Board. “Following the lead of Philadelphia, Minne-

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22. Coxe, *supra* note 2 at 150.

23. *Civil Liberties Record*, June 1960 at page 2.

24. *Ibid.*

apolis,<sup>25</sup> and York,<sup>26</sup> have established similar boards, on the initiative of local ACLU chapters. Branches of the ACLU in Cincinnati,<sup>27</sup> Pittsburgh, Seattle and Los Angeles,<sup>28</sup> are pressing for the creation of boards in their cities."<sup>29</sup>

This is not really determinative of any point, for no one can deny either the existence or the importance of pressure groups in our society. It must be given more consideration, however, when such a group takes that one step beyond advocacy into the area of agitation. That such agitation is the trademark of the ACLU campaign against the police appears not only from a simple scanning of its literature on the subject, but also by reviewing its campaign for the creation of the Police Advisory Board in Philadelphia.

It becomes all-important, of course, when such a group leaves the realm of advocacy, or even agitation, and enters into the position of "administrating" the program for which they fought. This is not to say that the Police Advisory Board is the ACLU. But it is apparent that the position of the ACLU is something more than just that of an interested onlooker. In the first place, it is clear that the ACLU had a great deal of influence in the original choice of the members of the Board, if only because of the fact that the Board was created by the Mayor, pursuant to an agreement with the president of the ACLU. In addition, the ACLU has maintained a close liaison with the Board and its operation, even to the extent of procuring the appointment of one of its own members as Executive Director. The latter has naturally stayed in close contact with the ACLU and has represented the Board on various speaking tours sponsored by the ACLU.

## V.

### THE FRATERNAL ORDER OF POLICE.

At the opposite end of the ledger, consideration must be given to the reaction of the FOP toward the Board. To say the least, it has not been favorable. The hostile attitude arose at the very suggestion that the police should be subject to surveillance by a civilian tribunal. This hostility

25. The Police Review Board of Minneapolis never began action because they feared that there was no way in which the members could be protected against suits for defamation arising out of any pronouncements by the Board or by its decisions. The same conclusion was applicable to witnesses who might appear. They felt that an act of the legislature was necessary to afford the Board the protection required.

26. The York, Pennsylvania Board is composed of a Negro Minister; a labor leader; a supervisory employee of the United States Post Office; an educator; and an attorney. Three complaints were received by the Board. Two of these were discontinued and at the time of this writing one was awaiting hearing.

27. A proposal to create a Police Review Board in Cincinnati was initiated in the City Council of that city, but it was rejected. A similar proposal was rejected by Detroit, Michigan.

28. Los Angeles has recently established such a board, but details were unavailable.

29. *Civil Liberties Record*, June 1960 at page 3.



has, since the formation of the Board, been directed specifically at this tribunal. But, inasmuch as the attempt to enjoin its operation ended with no appreciable success, the FOP has resigned itself to a diligent defense of all officers brought before the Board.

Although FOP hostility to any civilian authority over the individual officers can be understood, it can not, in justice, be defended. Even though most charges of "whitewash" against the older Police Board of Inquiry would seem to have been unfounded, the public in general, or the particular citizen having a complaint against the police, will not always sit down and study the statistics before forming a conclusion about the fairness of police review of police activities. He will be hesitant to bring charges against a policeman when he knows that the judges will be fellow officers.

It would appear then that if the FOP had adopted a more realistic and less adamant approach to the whole problem, a plan more favorable to both the public and the police could have been found. As it was, the negative attitude taken by the FOP forced the Mayor to rely solely on the ACLU and the NAACP for ideas in the formation of the Board.

## VI.

### CONCLUSION.

It is clear that some system for reviewing police activity must be available. While the justice and effectiveness of departmental review *may* be open to some debate, it is also clear that, from the standpoint of public opinion, such review is questionable since the complaint of a citizen against a policeman is being heard by other policemen. No matter how fair or just such a board may be, by its very nature it carries with it an aura of partiality. Likewise, the courts are not always the best method for the redress of grievances. In many cases the complaint is not serious enough to be classified as a crime. In many other cases, where it could be considered a crime, the drawn-out process and the high standard of proof will dissuade many a citizen. A separate and detached administrative board, free from any possible charge of partiality, is truly the answer. No criticism can be made, therefore, of the stated objectives of the Board, viz., to hear and review complaints of citizens against illegality or misconduct on the part of the police.

Criticism must be made, however, when such a tribunal becomes a "safety valve" for the emotions of the Negro community, or an arena in which to solve serious questions of race relations. It is clear that Negro communities in the great metropolitan centers are beset by many difficult and complex tensions and pressures. There can be no doubt that some method is needed to alleviate these tensions and pressures. A "safety valve" is, of course, only a temporary solution, and does not solve the underlying problems. Yet, so long as this method does not conflict with

either the long-range interests of the Negro or the interests of the community as a whole, it is acceptable. If, however, it does conflict, issue must be taken with the procedure, and it must be condemned. It is submitted that use of the Police Advisory Board as a temporary solution conflicts with both the above-mentioned interests.

It is true that the Board has given to the individual Negro and the NAACP a forum in which their cries of "police discrimination" and "police brutality" can be heard by sympathetic ears. It has, in this sense, fulfilled its purpose as "safety valve" for the frustrations of the Negro community, and, as such, has taken much pressure off of the City Administration and the individual councilmen. But this is simply the age-old procedure of "passing the buck." It does not, in any manner, solve the real problem. It evades it. The general problem of the Negro community in relation to the police is turned into a problem of the Negro community *versus* the individual policeman.

So long as this "safety valve" factor remains either explicit or implicit in the operation of the Board, even if it effects only one decision in twenty, the stated purpose of the Board is being subverted. It no longer remains a tribunal before which the complaints of citizens against the unlawful action of policemen can be *impartially* decided. It is no longer impartial with respect to the policemen. The individual policeman becomes a pawn in the "game" of racial relations, an offering to be thrown to the "lions" of racial and, therefore, political unrest. In such a case great *injustice* is being perpetrated in the name of social *justice*. Expedient as the use of a scapegoat may be, it cannot be condoned. Such a situation breeds injustice not only to the individual policeman, but also to the general public. For if only one officer, fearful of retaliation through the Board, fails to carry out his duty in the face of a tense interracial situation, society as a whole suffers.

The basic problem of police-Negro relations can only be solved by education of not only the individual policeman, but also of the Negro community. Education of the former in the problems of race relations is being carried out by the City of Philadelphia at its Police Academy. Education of the latter, in the true meaning of a citizen's duty to the Law, has been sadly lacking in many cases. This should be the primary goal of the NAACP and of society as a whole.

Finally, it is submitted that the influence of the ACLU over the choice of members and, therefore, indirectly, over the basic policy of the Board, should be ended. Such influence would appear to be antagonistic to the true purpose of the Board and to the important public interest involved. Since the evaluation and control of law enforcement, and hence of the police, is vitally important to society as a whole, any board which attempts such evaluation and control should represent the entire community, and not simply one school of thought. For this reason then, indorsement must be given to a plan analogous to that originally suggested by the ACLU.

Under that plan the Board would be composed of one member chosen by the City Managing Director, two members chosen by the Police Commissioner, and two members chosen by the Chancellor of the Philadelphia Bar Association. Such a Board would seem to be far more representative of public opinion than the one presently in existence.

*Robert J. Bray, Jr.*

#### SALES—DISCLAIMER OF WARRANTY OF DESCRIPTION IN GOVERNMENT SURPLUS CONTRACT CASES.

Traditionally, seed cases have presented the only clear cut exception to the general rule that warranties of description cannot be waived. Recently a new line of cases seems to have created a second exception. These cases have involved the sale of surplus goods by the United States Government. It is the purpose of this comment to explore the general principles of law applicable to disclaimers of the warranty of description, to consider the extent to which a seller can protect himself by such a disclaimer, and finally, to consider the unique situations posed by the seed cases and the government surplus contract cases.

#### I.

##### GENERAL PRINCIPLES APPLICABLE TO DISCLAIMERS OF WARRANTY OF DESCRIPTION.

At early common law, unless the seller expressly warranted the goods, all of the risks were borne by the buyer.<sup>1</sup> With the rise of the doctrine of implied warranties and the concomitant weakening of the notion of caveat emptor, sellers began to resort to the use of disclaimer clauses.<sup>2</sup> Under the widely adopted Uniform Sales Act, the warranty arising from a sale by description is classified as implied; this warranty obligates the seller to deliver goods which reasonably conform to the description.<sup>3</sup> Jurisdictions are not in accord as to the origin of such an implied warranty;

1. *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603).

2. See Note, 23 MINN. L. REV. 784 (1939).

3. UNIFORM SALES ACT § 14: "Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."; *Samuel v. Delaware River Steel Co.*, 264 Pa. 190, 107 Atl. 700 (1919); *Landes & Co. v. Fallows*, 81 Utah 423, 19 P.2d 389 (1933). Similar to § 14 is § 15(2): "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." See Comment, 5 DEPAUL L. REV. 273 (1956).

some have held that it arises from the intention of the parties, whereas others have stated that it is created by operation of law and is entirely independent of the particular contract.<sup>4</sup> If the buyer inspects or has an opportunity to inspect the goods and fails to do so, there can be no implied warranty against defects which the inspection would have disclosed.<sup>5</sup> But if the buyer is not given an opportunity to make a complete inspection<sup>6</sup> or if the inspection would not reveal the defects,<sup>7</sup> then the seller will be held to his warranty.

The Sales Act permits the parties to a contract to disclaim a warranty of description, either impliedly or by the express terms of the contract.<sup>8</sup> Even where there is an express disclaimer, however, the seller is only permitted to furnish goods which vary slightly in description. Cases in which the variance was held to be sufficiently slight involved a washing machine which would not wash properly,<sup>9</sup> potatoes which were partially rotten,<sup>10</sup> and cotton which varied in grade and quality.<sup>11</sup> In many situations an "as is" clause in a contract has the same effect as a disclaimer of the warranty of description. This clause enables one to unload a specific chattel in its then existing physical and mechanical condition without liability therefor.<sup>12</sup>

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4. Examples of the former view are *Burntis Land Shipbuilding Co. v. Barde Steel Products Corp.*, 278 Fed. 552 (D. Del. 1922), *Couts v. Sperry Flour Co.*, 85 Cal. App. 156, 259 Pac. 108 (Dist. Ct. App. 1927). Examples of the latter view are *J. B. Colt Co. v. Bridges*, 162 Ga. 154, 132 S.E. 889 (1926), *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927). See also 1 VAND. L. REV. 467 (1948). It has been argued that there can be an express warranty of description under § 12 of the Sales Act. 1 WILLISTON, SALES § 223 (rev. ed. 1948). See generally, Note, 49 KY. L.J. 240 (1960-61).

5. Cf. UNIFORM SALES ACT § 15(3); see Note, 53 COLUM. L. REV. 858 (1953).

6. *South Brooklyn Paper & Rag Co., Inc. v. F. G. Marguard, Inc.*, 180 N.Y. Supp. 28 (Sup. Ct. 1920).

7. *Union Pipe & Machinery, Ltd. v. Luria Steel & Trading Corporation*, 225 F.2d 829 (6th Cir. 1955). There are situations where the seller can deliver goods which literally conform to the contract description, and yet the seller will be held liable. Thus, in *Carleton v. Lombard, Ayers & Co.*, 149 N.Y. 137, 43 N.E. 422 (1896), the oil which buyer purchased corresponded to the contract description as to brand, color and fire test, but it turned out to have latent defects. At p. 425 the court stated, "The plaintiffs were entitled to something more than the mere semblance or shadow of the thing designated. . . . They were entitled to the thing itself, with all the essential qualities. . . ."

8. UNIFORM SALES ACT § 71, "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale." Where the disclaimer is expressed in the contract, some courts draw a distinction between the warranty arising by operation of law and that arising from the intention of the parties, and unless the disclaimer specifically covers both it will be strictly construed in favor of the buyer. Those courts which consider the warranty as arising solely from the intention of the parties are more liberal in their construction of the disclaimer, thereby favoring the seller. Note, 22 WASH. U. L.Q. 536 (1937).

9. *Marino v. Maytag Atlantic Co., Inc.*, 141 N.Y.S.2d 432 (N.Y. Munic. Ct. 1955).

10. *Gagnon v. Speback*, 383 Pa. 359, 118 A.2d 744 (1955); see Note, 1 VILL. L. REV. 360 (1955).

11. *Hartin Commission Co. v. Pelt*, 76 Ark. 177, 88 S.W. 929 (1905).

12. *Detroit Trust Co. v. Engel*, 192 Mich. 62, 158 N.W. 123 (1916) (defective cars); *Johnson v. Waisman Bros.*, 93 N.H. 133, 36 A.2d 634 (1944) (old steam

The Uniform Commercial Code has tried to settle some of the problems created by the Sales Act. In this area, it provides that the warranty of description is an "express" warranty,<sup>13</sup> and, since a disclaimer must be construed as consistent with an express warranty wherever reasonable,<sup>14</sup> any attempt to disclaim will generally have no effect on warranties expressed in the contract. Express warranties can be either specified in the contract or else given effect by operation of law. It is submitted that under the Code a reasonable interpretation of a clause disclaiming all express warranties is that it applies only to those warranties not specified in the contract. Since the warranty is "express," the buyer need not inspect; he can rely on the seller's affirmation and if the goods do not conform to the description, the seller will be liable under his warranty, regardless of whether an inspection would have disclosed the variance.<sup>15</sup>

The English Sales of Goods Act provides that when there is a sale of goods by description, there is an implied warranty that the goods will correspond.<sup>16</sup> Apparently this warranty arises only in cases where the buyer has not seen the goods and has relied solely on the description supplied by the seller.<sup>17</sup> If the sale is of a specific chattel, it is unlikely that a court will find it to be a sale by description.<sup>18</sup> It has been suggested that where a sale is by description, a disclaimer of the warranty of description will not relieve the seller, but where the sale is of a specific chattel, a disclaimer may very well exclude the warranty otherwise implied.<sup>19</sup>

## II.

### PROTECTION GENERALLY AFFORDED A SELLER BY A DISCLAIMER.

No jurisdiction will give effect to a disclaimer of the warranty of description where the goods delivered under the contract differ radically in kind from those ordered.<sup>20</sup> The disclaimer may be effective, however, in

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shovel); *Navarette v. Travis-Zeigler Co., Inc.*, 194 N.Y. Supp. 832 (N.Y. Munic. Ct. 1922) (decayed grapes).

13. UNIFORM COMMERCIAL CODE § 2-313 (1)(b): "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."

14. UNIFORM COMMERCIAL CODE § 2-316(1). There is possibly one situation where an express warranty may be excluded, *viz.*, where the contract states that the writing constitutes the entire agreement between the parties. This is the so-called "entirety" clause and it has been argued that this will effectively prevent claims of express warranties made orally prior to the writing. Note, 49 Ky. L.J. 240 (1960-61).

15. 1 WILLISTON, SALES § 208 (rev. ed. 1948); see generally Note, 23 MINN. L. REV. 784 (1939).

16. SALES OF GOODS ACT, 1893, 56 & 57 Vict., c. 71, § 13. In this section, England uses the word "condition" instead of "warranty."

17. *Varley v. Whipp* [1900] 1 Q.B. 513; see 103 L.J. 552 (1953); *Nicholson and Venn v. Smith Marriott*, 177 L.T. 189 (K.B. 1947).

18. *Druce & Co., Ltd. v. Leveson*, 102 L.J. 721 (1952).

19. 103 L.J. 552 (1953).

20. See, *e.g.*, *Downey v. Price Chemical Co.*, 204 Ky. 98, 263 S.W. 690 (1924); *Whitney v. Boardman*, 118 Mass. 242 (1875); *Schwartz v. Kohn*, 155 N.Y. Supp. 547 (Sup. Ct. 1915); *Kersales (Harrow), Ltd. v. Wallis*, [1956] 2 All E.R. 866; *Shepherd v. Kain*, 5 Barn. & Ald. 240, 106 Eng. Rep. 1180 (1821). 34 HALSBURY,

those situations where the goods are of the same kind but are so defective or deteriorated as to be worthless; in the cases, the difference is said to be only one of degree. Unfortunately there is no categorical test to determine when a difference in degree becomes a difference in kind. Authoritative statements can be made concerning the extreme situations only. When goods differ in kind there is much more than a breach of warranty involved; any consideration of the attempted disclaimer would therefore be irrelevant. In such a situation courts permit relief for failure or want of consideration, breach of contract, or mutual mistake.

In an action based on mutual mistake, if the thing received is different in substance from the thing bargained for, there is no contract.<sup>21</sup> But where the mistake concerns a difference in quality or accident, there is a binding contract.<sup>22</sup> For example, where a contract called for a "phantom beaver model coat" and the coat turned out to be a "phantom racoon coat," it was held that the mistake as to quality did not make the coat essentially different from the thing it was believed to be, and therefore the contract was not invalid on the ground of mutual mistake.<sup>23</sup> There are cases where the courts will defeat the seller and his purported disclaimer. In some cases where the seller has literally complied with the contract description, but the goods are otherwise worthless, the disclaimer has been overcome by a holding that there has been a failure or want of consideration.<sup>24</sup> Also, there are a few isolated instances where the disclaimer clause has been rendered ineffective by a holding that goods differed in kind, when, in fact, they did not.<sup>25</sup>

### III.

#### THE SEED CASES: A SPECIAL SITUATION.

Cases involving the sale of seeds exemplify the extreme to which courts have been willing to go to protect the seller. In the absence of a disclaimer, the general rule is that seed purchased by name is impliedly warranted to

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LAW OF ENGLAND 57-58 (1960); Montrose, *The Operation of Description in a Contract of Sale of Goods*, 15 CAN. B. REV. 760 (1937); Note, 31 COLUM. L. REV. 1325 (1931); 1939 WIS. L. REV. 459.

21. *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887); see generally, 12 HASTINGS L.J. 458 (1961).

22. *Druce & Co., Ltd. v. Leveson*, *supra* note 18.

23. *Ibid.*

24. *International Harvester Co. of America v. Bean*, 159 Ky. 842, 169 S.W. 549, 551 (1914) (auto advertised as being fit to operate on certain roads, when in fact it was not); *Poole v. Pinehurst, Inc.*, 215 N.C. 667, 2 S.E.2d 871 (1939) (boiler which plaintiff bought was so defective that it was condemned by the State); *Laitner Plumbing & Heating Co., Inc. v. McThomas*, 61 S.W.2d 270 (Mo. Ct. App. 1933) (electrical refrigeration equipment sold, which would not properly cool a refrigerator).

25. *E.g.*, *Massey-Harris Co. Ltd., v. Skelding*, [1934] 3 D.L.R. 193, S.C.R. 431, *aff'g.* [1933] 4 D.L.R. 303 (the court held in effect that a defective tractor is not a tractor); *Cotter v. Luckie*, [1918] N.Z.L.R. 811 (the court held that a bull unfit for breeding purposes is not a bull). See Note, 23 MINN. L. REV. 784 (1939).

be true to that name.<sup>26</sup> Unlike the sale of other articles, the fact that a buyer has made an inspection or has had an opportunity to inspect will not relieve the seller. The reason is that the variety of seed cannot ordinarily be determined by inspection and will not become known until it is planted and growing; therefore the purchaser must rely on the representation of the seller.<sup>27</sup> If the implied warranty is breached, the normal measure of recovery for the buyer is the difference between the value of the crop grown and the value of the crop that would have been grown had the seed been as warranted.<sup>28</sup> Primarily for this reason, dealers in seed have resorted to disclaimer clauses, which typically state that the seller gives no warranty, express or implied, as to description, productiveness, or any other matter, and will in no way be responsible for the crop. These clauses have generally protected the seller when the variety of seed received differed from that ordered.<sup>29</sup> It should be mentioned, however, that some farm states have made the use of these clauses illegal in certain circumstances;<sup>30</sup> this reflects a policy choice to protect the farmers in the state. Occasionally, even in the absence of a disclaimer clause, the merchant has been held to have made no warranty due to the general custom among seed sellers in the area not to warrant the variety of seed delivered.<sup>31</sup>

There appear to be sound reasons for the extension of special protection to the seed merchant. Since the price of seed is usually insignificant

26. *Johnson v. The Foley Milling & Elevator Co.*, 147 Minn. 34, 179 N.W. 488 (1920); *Grafton-Stamps Drug Co. v. Williams*, 105 Miss. 296, 62 So. 273 (1913); *Pauls Valley Milling Co. v. Gabbert*, 182 Okla. 500, 78 P.2d 685 (1938); *Parrish v. Kothaff*, 128 Ore. 529, 274 Pac. 1108 (1929). In one case the court allowed recovery on the basis of breach of warranty of merchantability where the buyer ordered "good field corn, the kind you husk" and he was given ensilage corn seed which would not ripen as field corn would. *Sokoloski v. Splann*, 311 Mass. 203, 40 N.E.2d 874 (1942); see Comment, 5 DEPAUL L. REV. 273 (1956).

27. *E.g.*, *Henderson v. Berce*, 142 Me. 242, 50 A.2d 45 (1946).

28. See 31 TEXAS L. REV. 223 (1952) and the cases therein cited.

29. *Kibbe v. Woodruff*, 94 Conn. 443, 109 Atl. 169 (1920) (Canada field corn seeds ordered, slow maturing corn seeds delivered); *Blizzard Bros. v. Growers' Canning Co.*, 152 Ia. 257, 132 N.W. 66 (1911) (large cheese pumpkin seed ordered, different variety received); *Landreth Seed Co. v. Kerlec Seed Co.*, 12 La. 506, 126 So. 460 (1930) ("Broad Leaf Flanders" spinach seed and "Lenz" beet seed ordered, "Curley Top" spinach seed and "Root" beet seed delivered); *Miller v. Klindworth*, 98 N.W.2d 109 (N. Dak. 1959); *Lumbrazo v. Woodruff*, 256 N.Y. 92, 175 N.E. 525 (1931) (Japanese onion seeds ordered, inferior variety received); *Hall v. Mosteller*, 245 S.W.2d 338 (Tex. Civ. App. 1951) (Black Diamond water melon seed ordered, pie and citron melon seed received), see 31 TEXAS L. REV. 223 (1952); *Pyle v. Eastern Seed Co.*, 145 Tex. 385, 198 S.W.2d 562 (1946) (Babosa onion seed ordered, different variety received); *Hoover v. Utah Nursery Co.*, 79 Utah 12, 7 P.2d 270 (1932); *Larson v. Inland Seed Co.*, 143 Wash. 657, 255 Pac. 919 (1927) (spring rye seed ordered, fall rye seed received); *Jolly v. C. E. Blackwell & Co.*, 122 Wash. 620, 211 Pac. 748 (1922) (spring rye seed ordered, fall rye seed received); *Seattle Seed Co. v. Fujimori*, 79 Wash. 823, 139 Pac. 866 (1914); *Ross v. Northrup, King & Co.*, 156 Wis. 327, 144 N.W. 1124 (1914) (Comstock Spanish tobacco seed ordered, inferior variety received); *Leonard Seed Co. v. Crary Canning Co.*, 147 Wis. 166, 132 N.W. 902 (1911) (Advancer Pea seed ordered, mixed variety received).

30. *E.g.*, S.D. CODE § 4.10A03 (Supp. 1960); N.D. REV. CODE § 4-09-14 (1959).

31. *E.g.*, *Miller v. Germain Seed & Plant Co.*, 193 Cal. 62, 222 Pac. 817 (1924); *Hoover v. Utah Nursery Co.*, *supra* note 29. *Contra*, *American Warehouse Co. v. Ray*, 150 S.W. 763 (Tex. Civ. App. 1912).

when compared with the value of the crop that might be produced therefrom, the seller would either be forced to raise seed prices sharply or be pressured out of business completely if he could not avail himself of disclaimer clauses. Despite occasional mistakes and resultant uncompensated losses, it is better that the seed dealer be permitted to provide farmers with seeds which generally are reliable, rather than insure the purchasers against all variances in the quality and productivity of the seed they receive.

Despite this, however, the English courts have refused to give effect to the disclaimer. This may be due to a belief that a difference in variety is really a difference in kind, or possibly the result of a conviction that the delivery of the specified variety of seed is a condition of the buyer's obligation to accept and pay for them.<sup>32</sup> But no matter what jurisdiction is involved, a disclaimer will not prevail where the seeds differ in kind.<sup>33</sup>

#### IV.

#### SALE OF GOVERNMENT SURPLUS GOODS: ANOTHER SPECIAL SITUATION.

A seller who has recently been receiving the special protection formerly given only to seed dealers is the United States Government — when it sells surplus goods which its various agencies and departments have procured. These are articles which the Government no longer needs and which are disposed of to minimize loss. There is no doubt that the Government is liable for breach of warranty where the goods do not conform to the description in the contract,<sup>34</sup> unless it protects itself by some form of disclaimer clause. The typical disclaimer clause to which it has resorted is very broad and all-inclusive. The buyer is cautioned to inspect before bidding, and is told that in no case will failure to inspect constitute grounds for a claim or for the withdrawal of a bid after opening. All property is offered for sale "as is" and "where is," and the description is based upon the best available information. The Government makes no guaranty or warranty, either expressed or implied, as to quantity, kind, character, quality, weight, size, or description. No claim will be considered for allowance, or adjustment, or rescission of the sale based upon failure

32. *Wallis, Son & Wells v. Pratt & Haynes*, [1911] A.C. 394 (common English sainfoin seed ordered, giant sainfoin delivered); *Howcroft v. Laycock*, 14 T.L.R. 460 (1898) (Couve Tronchuda cabbage seed ordered, Jersey kale cabbage seed received). There are a few American cases in accord: *Corneli Seed Co. v. Ferguson*, 64 So. 2d 162 (Fla. 1953) (Black Diamond water melon seed ordered, different variety received); *Phelps v. Grand Rapids Growers, Inc.*, 341 Mich. 62, 67 N.W.2d 59 (1954) (yellow Globe onion seed ordered, white onion seed delivered); *Wood v. Quillin*, 167 Va. 255, 188 S.E. 216 (1936) (White Burley Tobacco seed ordered, dark tobacco seed delivered).

33. *Rocky Mountain Seed Co. v. Knoor*, 92 Colo. 320, 20 P.2d 304 (1933); *Smith v. Oscar H. Will & Co.*, 51 N.D. 357, 199 N.W. 861 (1924); *Black v. B. B. Kirkland Seed Co.*, 158 S.C. 112, 155 S.E. 268 (1930); *American Warehouse Co. v. Ray*, 150 S.W. 763 (Tex. Civ. App. 1912). In the latter case, the seed was characterized as different in kind, but from the facts it appeared to differ merely in variety.

34. *Beer v. United States*, 100 F. Supp. 808 (Ct. Cl. 1951).



of the property to correspond with the standard expected, and it is not a sale by sample. All these provisions of disclaimer are clearly spelled out in the contract.<sup>35</sup>

There have been many attempts by disappointed buyers to recover against the Government in the face of this blanket disclaimer or a similar one, but they have rarely been successful. For example, the purchaser has been precluded from recovery where he received dirty and stained elastic webbing which varied from the sample shown to him;<sup>36</sup> where he relied on a code stamp on the sales document which to him meant that the articles were "new";<sup>37</sup> where he received tent poles that were rotten;<sup>38</sup> where a portion of "unused" sun helmets turned out to be used;<sup>39</sup> where the damaged Navy trousers which were received varied from those on display at the auction;<sup>40</sup> where blankets, unfit for use, were received;<sup>41</sup> where shells varied in weight from the description;<sup>42</sup> where grain bags were so deteriorated as to be worthless;<sup>43</sup> where saddles, advertized as "new," turned out to be used;<sup>44</sup> and finally, where towels, described as "new," were damaged.<sup>45</sup> In many of the foregoing cases, the courts emphasized the fact that the buyer had an opportunity to inspect and neglected to do so. However, unless the purchaser had an opportunity to inspect the whole lot of items prior to bidding for them, that argument would seem to be only a makeweight. For it is submitted that even in those situations where the buyer inspected a sample of the goods, or had an opportunity to do so, the courts will, in finding for the Government, rely on the usual wording of the disclaimer that it is not a sale by sample and therefore the buyer had no right to rely on the display.

In the preceding cases the buyer received goods which did not meet the standard of quality or the exact description that he expected. But the outcome of these cases is not shocking in light of the fact that there was no extreme variation which could be considered a difference in kind. The same result should occur in an ordinary commercial transaction. This, however, cannot be said for cases such as *Dadourian Export Corporation v. United States*.<sup>46</sup> In that case, the plaintiff was the high bidder on government surplus materials described in the bid forms as "Manila cargo nets." Subsequently, after neglecting to make an inspection, he discovered

35. These provisions were taken directly from the contract involved in *Dadourian Export Corporation v. United States*, 291 F.2d 178, 180 (2d Cir. 1961).

36. *American Elastics, Inc. v. United States*, 187 F.2d 109 (2d Cir. 1951), cert. denied, 342 U.S. 829, 72 Sup. Ct. 53 (1951).

37. *United States v. Kelley*, 112 F. Supp. 831 (E.D. Mo. 1953).

38. *United States v. Atlantic Wrecking Co.*, 8 F.2d 542 (N.D. Ga. 1925).

39. *American Sanitary Rag Co. v. United States*, 161 F. Supp. 414 (Ct. Cl. 1958).

40. *Sachs Mercantile Co., Inc. v. United States*, 78 Ct. Cl. 801 (1934).

41. *S. Silberstein & Son, Inc. v. United States*, 69 Ct. Cl. 412 (1930).

42. *S. Snyder Corporation v. United States*, 68 Ct. Cl. 667 (1930).

43. *S. Brody v. United States*, 64 Ct. Cl. 538 (1928).

44. *Triad Corporation v. United States*, 63 Ct. Cl. 151 (1927).

45. *Herman H. Panama v. United States*, 63 Ct. Cl. 283 (1927).

46. 291 F.2d 178 (2d Cir. 1961).

that the nets he purchased were not cargo nets, but saveall nets, only a few of which were made of Manila rope. As previously mentioned, when a buyer receives articles which are different in kind from those contracted for, he may obtain relief on the ground that there was a mutual mistake of fact going to the very identity of the goods. That precise argument was made in *Dadourian*, but the court rejected it, holding that the word "Manila" was merely descriptive and that the subject matter of the contract was nets, or nets used in shipping.<sup>47</sup> Manila rope is much more valuable than fiber rope, and it would seem that the court in effect permitted the Government to mislead bidders with erroneous contract descriptions.

Other cases involving Government surplus supplies have reflected the same willingness to extend the doctrine of caveat emptor to an extreme in the face of narrow contract stipulations. In *United States v. Hathaway*,<sup>48</sup> the purchaser of four sets of steel lock gates which were submerged in a canal and which were understood to be removable by salvage operations, was denied relief even though two of the sets were impossible to salvage and despite the fact that neither party was cognizant of their true condition. Addressing itself to the same contention raised in *Dadourian*, the court stated that mutual mistake renders a contract voidable only if the parties had not agreed between themselves that the risk of such mistake was assumed by the purchaser. The purchaser was held to have purchased on a grab bag basis, in which he ventured and lost; thus the law provides no remedies for bad bargains willingly risked with open eyes. In *United States v. Silvertown*,<sup>49</sup> defendant was the high bidder for an item described as "Textile, Cotton," which included 40,000 pounds of "Webbing, scrap, mixed." Most of the articles in the shipment had pieces of metal attached, but nevertheless defendant was denied relief despite the definite trade usage in the waste material business that "Webbing, scrap, mixed" meant webbing free of metal components. In *W. E. Hedger Co., Inc. v. United States*,<sup>50</sup> the buyer purchased a tug described as equipped with a towing engine but which, in fact, did not have such an engine. In the buyer's unsuccessful action to recover damages, the court stated that plaintiff was fully advised by the disclaimer that it had no right to rely on the description.

There are some federal cases which seem at first blush to be contra to *Dadourian*. *Krupp v. Federal Housing Administration*<sup>51</sup> is an example. The Government was selling an apartment project which a prospectus described as having garage space for 100 cars; the prospectus also stated that the purchaser would be expected to accept the property in its present physical condition without warranty. Since only fifty garages were included in the project, the buyer was permitted recovery on the basis

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47. *Id.* at 183.

48. 242 F.2d 897 (9th Cir. 1957).

49. 200 F.2d 824 (1st Cir. 1952).

50. 52 F.2d 31 (2d Cir. 1931).

51. 285 F.2d 833 (1st Cir. 1961).

of breach of warranty. This case is easily distinguishable from *Dadourian* since it involved no specific disclaimer of the warranty of description. Indeed, if the latter had been present, the court in *Krupp* intimated that it would have decided the matter the other way.<sup>52</sup> *United States v. Koplin*<sup>53</sup> involved a situation where the buyer was permitted to reject goods which were not "new" as described. Although a *Dadourian* type disclaimer was present, this case is also distinguishable for here the buyer had absolutely no opportunity to inspect, whereas in *Dadourian* there was such an opportunity. In *United States v. Blake*<sup>54</sup> a purchaser was granted relief since the articles he bought were materially altered in quality by external elements after he had inspected them and while they were still in the Government's possession.

No federal case has been found in which a buyer under a government surplus contract has been forced to accept goods which obviously differ in kind. Although such a determination is largely one of fact, it is clear that, at least in the obvious situation, *e.g.*, apples being delivered under a contract calling for oranges, the courts will not protect the Government.<sup>55</sup> Apparently the buyer may also be protected where the Government delivers substantially fewer articles than the bid form specifies,<sup>56</sup> for like a failure to deliver the kind of articles purchased, this is a substantial variation from the contract. *Dadourian*, it is submitted, represents the outer perimeter of the protection that the federal courts will extend to the Government. And the fact that federal law is applicable to these situations facilitates this extension.<sup>57</sup> Further, there are sound policy reasons for the courts' attitude:

... it is to be noted that this is no ordinary contract between buyer and seller for the purchase and sale of a valuable commodity. When the government sells surplus goods it is trying to dispose of a vast miscellany of used and unused property in an effort, so far as may

52. *Id.* at 835.

53. 24 F.2d 840 (N.D. Ga. 1928).

54. 161 F. Supp. 76 (E.D. N.C. 1958).

55. This was intimated in *Dadourian*. At p. 183 the court said in effect that the goods did not differ in kind. "We believe the subject matter of the contract was nets or nets used in shipping." See *American Elastics, Inc. v. United States*, 84 F. Supp. 194 (S.D. N.Y. 1949). There the buyer ordered head harnesses and a portion of the goods received were not head harnesses but rather metal bits and short strips. The court had this to say at p. 197, "... [the disclaimer does not] bar the right to reject goods of a nature different from those contracted for."

56. *E.g.*, *S. Silberstein & Son, Inc. v. United States*, 69 Ct. Cl. 412 (1930); *S. Brody v. United States*, 64 Ct. Cl. 538 (1928). But there are cases where the wording of the disclaimer has been held to protect the Government even in this situation. *Mottram v. United States*, 271 U.S. 15, 46 Sup. Ct. 386 (1926); *Lipshitz & Cohen v. United States*, 269 U.S. 90, 46 Sup. Ct. 45 (1925).

57. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 Sup. Ct. 573 (1943); *Krupp v. Federal Housing Administration*, 285 F.2d 833 (1st Cir. 1961); *New York, N. H. & H. R. Co. v. Reconstruction Finance Corporation*, 180 F.2d 241 (2d Cir. 1950); *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949). If the Uniform Commercial Code were the governing law, for example, a court would be unable to give a disclaimer as much effect as it was given in *Dadourian*, since the Code displays a negative attitude toward the disclaimer of the express warranty of description or sample.

under the circumstances be possible, to minimize its loss. Sales of this character are processed on a mass quantity basis by members of the armed forces who seldom if ever have any expertise in the particular items which come to their warehouses and depots. Buyers of such surplus property know perfectly well that there is always the chance of buying property that may turn out to be of little value, or may develop into a great bargain with a huge windfall of profit.<sup>58</sup>

In order to solicit bids, the Government must describe the articles, and its ineptness in so doing is made known to the bidder. The purchase is on a grab bag basis, and full protection can be had only if the buyer takes the trouble to inspect the whole lot before submitting his bid. One objection that may be raised concerning the prevailing view, is that some government agency might be prompted to deliberately falsify the description of goods in a bid form so as to solicit higher bids, and then shield itself behind the disclaimer clause.<sup>59</sup> But, to reiterate, an intelligent bidder will protect himself by inspection.

## V.

### SUMMARY.

A disclaimer, no matter how all-inclusive the wording, will not protect a seller who attempts to fulfill his part of the contract by delivering goods which actually differ in kind from those ordered. Where the variance from the description is one of degree rather than of kind, the seed cases and government surplus contract cases have given disclaimer clauses their most extreme application. The outcome of any given seed case, though, is more predictable than a surplus contract case. This is so since the courts have consistently adhered to the variety-kind delineation; once it is known what seeds the contract calls for and what seeds were actually delivered, the court can then simply apply the law. But with government surplus contracts, there is great room for advocacy as to whether the particular goods differ in kind. And as evidenced by *Dadourian* the courts will take a narrow view as to what is a difference in kind, thus placing a heavy burden on the buyer to meet the court's conception. Furthermore, in the seed cases one of the main reasons for protecting the merchant is that inspection will not disclose variety. But in the surplus contract situation, the buyer is warned to inspect and his failure to do so will weigh heavily against him. If the buyer does not inspect, it is likely that the Government will be successful if the goods in any way resemble the description in the contract.

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58. *Dadourian Export Corporation v. United States*, 291 F.2d 178, 182 (2d Cir. 1961). The statement that the buyer may experience a windfall is not without truth. *E.g.*, *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949).

59. Although contract claims are permitted against the United States, no claim can be made against it for negligent or willful misrepresentation. *Jones v. United States*, 207 F.2d 563 (2d Cir. 1953), *cert. denied*, 347 U.S. 921, 74 Sup. Ct. 518 (1954); *Miller Harness Co., Inc. v. United States*, 241 F.2d 781 (2d Cir. 1957).